CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/20

In the matter between:

CENTRE FOR CHILD LAW	Applicant
and	
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
MENZILE LAWRENCE NAKI	Third Respondent
DIMITRILA MARIE NDOVYA	Fourth Respondent

Neutral citation: *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Victor AJ (majority): [1] to [89]
Mogoeng CJ (dissenting): [90] to [145]

Heard on: 1 September 2020

Decided on: 22 September 2021

Summary: Births and Deaths Registration Act 51 of 1992 — constitutionality of section 10 — section is unconstitutional

Section 9 of the Constitution — unfair discrimination — section 10 fails the *Harksen* test

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown (hearing an appeal from the High Court of South Africa, Eastern Cape Division, Grahamstown):

1. The declaration of constitutional invalidity of section 10 of the Births and Deaths Registration Act 51 of 1992 (Act) by the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown, is confirmed in the terms set out in paragraphs (a) and (b):

   (a) It is declared that section 10 of the Act is invalid in its entirety and consequently severed from the Act.

   (b) The proviso in section 9(2) of the Act stating that the provision is "subject to the provisions of section 10" is severed from section 9(2) by reason of the declaration of constitutional invalidity of section 10.
2. The declaration of constitutional invalidity referred to in paragraphs (a) and (b) takes effect from the date of this order.
3. The first respondent must pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

VICTOR AJ (Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

> "Children are the soul of our society. If we fail them, then we have failed as a society."[1]

[1] A surname connects us to our heritage and roots us in history and family tradition. In many African cultures, names not only connect a person to their immediate family, but also convey a spiritual connection to one's broader community, clan, and ancestors.

[2] Despite South Africa having one of the most progressive Constitutions in the world,[2] which prescribes that a child's best interests are of paramount importance,[3] there remains a piece of legislation in which the registration of children born out of wedlock is classified as a separate category. Section 10 of the Births and Deaths Registration Act[4] (Act) bears the heading "Notice of birth of child born out of wedlock" and provides for a bifurcated registration procedure between children born in and out of wedlock.

[3] The interplay between sections 9 and 10 of the Act is foundational to the issues in this case. Section 9 of the Act, in relevant part, provides for notice to be given of a child born alive in the following circumstances:

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[1] *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ) at para 1.

[2] In an interview before her death, the late Justice Ruth Bader Ginsburg of the Supreme Court of the United States of America said on Egyptian TV, Egyptians, who were selecting a team to draft a new constitution, should not consider the United States of America's iconic document, but instead the "great piece of work" completed in South Africa in 1996. See Staff Writer "Eighteen Years of the World's Best Constitution" *Brand South Africa* (11 December 2014), available at https://www.brandsouthafrica.com/people-culture/history-heritage/eighteen-years-of-the-world-s-best-constitution.

[3] Section 28 of the Constitution provides:

> "(1) Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

[4] 51 of 1992.

> "(1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.
>
> (1A) The Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.
>
> (2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned, or the surnames of both the father and mother joined together as a double barrelled surname.
>
> (3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth."

[4] Section 10 of the Act provides:

> "(1) Notice of birth of child born *out of wedlock* shall be given—
> (a) under the surname of the mother; or
> (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.
>
> (2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth."

[5] It is this bifurcated procedure that is the subject of this matter. At issue here are an array of difficulties that arise from section 10 of the Act. The first is the difficulty experienced by unmarried fathers in registering the births of their children in their own

surnames, if the consent of the mothers has not been obtained or if the mothers are unavailable. There are instances where a mother may be available but, for whatever reason, consent may not have been obtained. There are also instances where the mother may have disappeared and left the child with the father, and thus not be available to give consent. Second, there is the problem of undocumented mothers who live and give birth to children in South Africa and are unable to register the births of these children. Third, another difficulty arises as a result of the requirement that parents who are non- South African citizens must produce a certified copy of a valid passport or visa.[5]

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[5] Regulations on the Registration of Births and Deaths, GN R128 *GG* 37373, 26 February 2014. Regulation 8 provides:

> "Notice of birth of children born of parents who are non-South African citizens:
>
> (1) A notice of birth of a child born of parents who are non-South African citizens and who are not permanent residents or refugees must be given as contemplated in sub-regulation (3) by either parent of the child within 30 days of the birth of the child in the Republic.
>
> (2) Where the parents of the child whose birth is sought to be registered as contemplated in sub-regulation (1) are deceased, the notice of birth may be given by the next-of-kin or legal guardian of the child.
>
> (3) A notice of birth referred to in sub-regulation (1) must be given to the Director-General on Form DHA-24 illustrated in Annexure 1A and be accompanied by—
>
> (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who—
>
> (i) attended to the birth; or
>
> (ii) examined the mother or the child after the birth of the child;
>
> (b) an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1F;
>
> (c) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;
>
> (d) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian;
>
> (e) where applicable, a certified copy of an asylum seeker permit issued in terms of section 22 of the Refugees Act of the mother or father or both biological parents of the child;
>
> (f) where applicable, a certified copy of the death certificate of any deceased parent of the child;
>
> (g) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
>
> (h) where applicable, Form DHA-288/B illustrated in Annexure 2C; and
>
> (i) proof of payment of the applicable fee.
>
> (4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in sub-regulation (1) must be

The Act and its Regulations make no provision for the scenario where one of the parents is a South African citizen and the other parent is a foreign national who does not have a valid passport or visa.

[6] This case requires a careful analysis of the impact of the interplay between sections 9 and 10 of the Act in order to determine whether the sections further the constitutional goal of equality and dignity for unmarried parents and their biological children.

[7] These are confirmation proceedings in terms of sections 172(2)(d) and 167(5) of the Constitution for confirmation of the unanimous order granted by the Full Court. Accordingly, this Court's supervisory jurisdiction is automatically engaged.

Background

[8] The third respondent, Mr Menzile Lawrence Naki (Mr Naki), and the fourth respondent, Ms Dimitrila Marie Ndovya (Ms Ndovya), met around 2008 in the Democratic Republic of Congo (DRC) whilst Mr Naki, a South African citizen and member of the South African Defence Force, was stationed in the DRC for a peace-keeping mission. They married in the DRC in accordance with the culture and customs of Ms Ndovya, a citizen of the DRC. This marriage was not registered because customary marriages are not registered in the DRC. Two children were born from their marriage, one of whom is their daughter, NN, born in Grahamstown on 1 February 2016. Before NN's birth, Ms Ndovya travelled to and from South Africa on a visitor's visa. Shortly before NN's birth, Ms Ndovya's visa expired while in

given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in sub-regulation (3) and the exact time of each birth must be recorded in that Form.

(5) Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate without an identity number on Form DHA-19 illustrated in Annexure 24, in terms of section 5(3) of the Act."

South Africa. Upon its expiry, she was at an advanced stage of pregnancy and could neither apply for a new visa nor travel back to the DRC.

[9] Following the birth of their daughter, they sought to register her birth with the Department of Home Affairs (Department). The Department refused to register her birth because Ms Ndovya was not in possession of a valid visa or permit and could not comply with Regulations 3(3)(f),[6] 4(3)(f)[7] or 5(3)(f),[8] regardless of the fact that their daughter was a South African citizen.[9] They were informed that their daughter's birth could not be registered until such time that Ms Ndovya complied with the Regulations. The Department refused to recognise their customary law marriage, and thus, NN had to be treated as a child born out of wedlock.

Litigation history

[10] The parents subsequently brought an application in the High Court of South Africa, Eastern Cape Division, Grahamstown to: (i) review and set aside the

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[6] Regulation 3(3)(f) provides:

> "A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—
>
> . . .
>
> (f) a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen."

[7] Regulation 4(3)(f) provides for the late registration of the birth of children of South African citizens:

> "A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—
>
> . . .
>
> (f) a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen."

[8] Regulation 5(3)(f) provides for the late registration of the birth of children older than one year born of South African citizens:

> "A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—
>
> . . .
>
> (f) a certified copy of the identity document or passport and visa or permit of the parents of the child or persons whose birth is sought to be registered, where one of the parents is a non-South African citizen."

[9] Section 2(1)(b) of the South African Citizenship Act 88 of 1995 provides that "any person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth". See further this Court's recent judgment in *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) (*Chisuse*).

Department's decision to refuse to register their daughter's birth, or alternatively, the Department's failure to take a decision on the application to register her birth; (ii) compel the Department to register their daughter's birth; (iii) challenge the Department's interpretation of Regulations 3(3), 3(5), 4(3), 4(5), 5(3) and 5(5); and (iv) challenge, to the extent necessary, the constitutionality of those Regulations.

High Court

[11] The Centre for Child Law, a registered law clinic based in the Law Faculty at the University of Pretoria, which is the applicant before this Court, was admitted as an intervening party in the High Court. It sought orders declaring sections 9 and 10 of the Act unconstitutional to the extent that they do not allow unmarried fathers to register the births of their children in the absence of the mothers of such children. It proposed the remedy of reading-in to both sections. It also sought orders declaring sub-regulations (3) and (5) of Regulations 3, 4 and 5 and Regulation 12(1)[10] unconstitutional to the extent that they do not allow unmarried fathers to register the birth of their child in the absence of the child's mother or where the child's mother is undocumented.

[12] The High Court, per Bodlani AJ, granted the parents' relief regarding the registration of their daughter's birth. The remaining issues for determination were those relating to the constitutionality of the Regulations and the Act. The central issue was whether sections 9 and 10 of the Act, sub-regulations (3) and (5) of Regulations 3, 4, and 5 and Regulation 12(1) prevent fathers from registering their child's birth if the child's mother is a foreigner whose presence in the Republic may not be in accordance with the law and/or in the event of the absence of that child's mother.

[10] Regulation 12(1) provides:

> "A notice of birth of a child born *out of wedlock* shall be made by the mother of the child on Form DHA- 24 illustrated in Annexure 1A [to the Regulations] or Form DHA-24/LRB illustrated in Annexure 1A [to the Regulations], whichever applicable."

[13] In relation to section 9, the High Court found that nowhere does it indicate that the notification of birth may only be given by married parents. It held that the wording of section 9(1) suggests that it was never intended by the Legislature that only one of the child's married parents and/or only married parents to a child born alive would be permitted to give notification of a child's birth. It further held that any one of the parents of a child who is able to and/or both such parents would, in law, enjoy the right to give notice of their child's birth regardless of their marital status. The rationale for this interpretation arose from the wording "any child born alive", which meant any child born alive regardless of the marital status of the child's parents.

[14] In relation to section 10, the High Court noted that the section does not deal with the notification of a child's birth. It held that, on a proper construction, the section deals with the assignment of a surname to a child during the process of notification of their birth, which is dealt with in section 9 of the Act. It found that the first "mother" in subsection (2) was intended to be "father". It did not make a pronouncement on the constitutional validity of section 10(1)(a). It held that on their current formulation, sections 9 and 10 of the Act do not forbid unmarried fathers to register the births of their children in the absence of the mother who gave birth to such children. It held that the requirement is that such children must be born alive, in which case any one of the parents, regardless of their marital status, would be able to give notice of birth. This interpretation, it held, is not only faithful to the wording of the statute, but also does not unduly strain the meaning of the words employed therein. The sections could thus be interpreted to be constitutionally compliant.

[15] In relation to the Regulations, the High Court held that sub-regulations (3)(a), (b), (c), (d), (e), (g), (h) and (j) of Regulations 3, 4 and 5 need not be tampered with, as it was only sub-regulations (3)(f), (i) and (5) of Regulations 3, 4 and 5 that had yielded the consequences that led the parents to approach the Court. It found that, based on the text of the impugned sub-regulations, in the event that the requirements of sub-regulation (3) of Regulations 3, 4 and 5 are not met, notice of such birth will not be accepted, with the result that there will be no registration of birth. It held that the

implementation of the impugned sub-regulations inhibits access to the rights in sections 28(1)(a) and (2) of the Constitution and is thus inconsistent with the Constitution.

[16] The High Court thus refused to declare sections 9 and 10 of the Act unconstitutional, but declared sub-regulations (3)(f) and (i), and sub-regulation (5) of Regulations 3, 4 and 5, and sub-regulation (1) to Regulation 12 as constitutionally invalid. The High Court read in certain words in order to cure the defects in the sub-regulations.

Full Court of the High Court

[17] With leave, the applicant appealed the order of Bodlani AJ to the Full Court on the question of the constitutional validity of section 10 of the Act. In brief, it argued that the word "mother" is duplicated in section 10, and this was an error. And if the duplication of the word "mother" was an error, and was actually intended to be "father", that would not remedy the unconstitutionality because section 10 would still not allow for the notice of birth of a child born out of wedlock to be given under the surname of an unmarried father in the absence of the child's mother. Such notice still required the mother's consent.

[18] The Full Court found that, even though section 9 empowers an unmarried father to give notice of his child's birth, the exercise by an unmarried father of his right under section 9(1), by virtue of section 9(2), is contingent on either the mother's presence (as per section 10(1)(b)) or her consent (as per section 10(2)). In effect, the Full Court found that section 10 presents a bar when it comes to the father notifying the birth of his child under his surname in the mother's absence. In this case, the mother did not have the requisite permission to be in South Africa.

[19] In conclusion, the Full Court accepted the reading-in proposed by the applicant on the basis that it addressed the issues raised in the appeal by: (i) removing the impediment confronting unmarried fathers and (ii) removing the impediment affecting

a specific class of children, in this case, children born out of wedlock. It declared section 10 of the Act inconsistent with the Constitution and invalid to the extent that it does not allow unmarried fathers to give notice of the births of their children under their surname in the absence of the mothers of such children. As an interim remedy, the Full Court proposed reading-in two additions to section 10(1) of the Act. These additions are highlighted below as (b) and (c). The Full Court proposed that section 10(1) be deemed to read as follows:

> "(1) Notice of birth of a child born out of wedlock shall be given—
>
> (a) under the surname of the mother; or
>
> (b) *under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath;*
>
> (c) *at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged."*

In this Court

Applicant's submissions

[20] The applicant contends that section 10 of the Act is unconstitutional on the basis that it prohibits unmarried fathers from giving notice of their child's birth under their surname in the absence of the child's mother. This, the applicant submits, unfairly discriminates against children and results in the children not being able to fully realise

their constitutionally guaranteed rights, such as the rights enshrined in sections 28(1)(a), 28(2), 3(2)(a),[11] 19(3),[12] 10,[13] 20,[14] 27[15] and 29 of the Constitution.[16]

[21] The applicant submits that the starting point in any matter concerning the rights of a child is always the best interests of the child principle. Children are vulnerable members of society, even more so when they are without valid birth certificates. The latter are at greater risk of exclusion from accessing social assistance and healthcare, and crucially, access to their nationality. As children have a fundamental right to be registered immediately after their birth to acquire a nationality, it is not in the best interests of a child to be rendered stateless. The applicant submits that the effects of the impugned legislative provisions result in disproportionately more severe consequences for children who are born to indigent families.

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[11] Section 3(2)(a) of the Constitution provides:

> "(2) All citizens are—
>
> (a) equally entitled to the rights, privileges and benefits of citizenship."

[12] Section 19(3) of the Constitution provides:

> "(3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[13] Section 10 of the Constitution provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[14] Section 20 of the Constitution provides:

> "No citizen may be deprived of citizenship."

[15] Section 27(1) of the Constitution provides:

> "(1) Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[16] Section 29(1)(a) of the Constitution provides:

> "(1) Everyone has the right—
>
> (a) to a basic education, including adult basic education."

Respondents' submissions

[22] The first and second respondents concede that section 10 is unconstitutional, but raise different reasons from those of the applicant. They contend that section 10 of the Act does allow an unmarried father to register the child's birth without the mother's consent; but that the father cannot do so under his surname. Essentially, the respondents argue that section 10 only addresses the issue of the child's surname and not the manner and requirements for notification of the child's birth. Furthermore, in their view, section 9 establishes equality between both parents with respect to the right and obligation to register the child's birth, irrespective of their marital status.

[23] The main issue, according to the respondents, is that section 9 and section 10 are in conflict with each other. Whereas section 9 empowers either parent to register their child's birth and assign their surname or a double-barrelled surname, as the case may be, section 10 enables only the mother's surname to be used and sets out the requirements for this. Accordingly, the respondents submit that the problem with section 10 is that it is under-inclusive. The first and second respondents also argue that section 11(4) and (5) of the Act compound this discrimination by placing additional burdens and hurdles on unmarried fathers in respect of their children born out of wedlock.[17]

[24] They also submit that this under-inclusiveness infringes the father's right to equality and the child's right to their father's surname from birth. During oral argument before this Court, the respondents submitted that if section 10 is struck down in its entirety and the words "subject to the provisions of section 10" in section (9)(2) are excised, any father, irrespective of their marital status, will be able to give notice and register the birth of their child.

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[17] The additional hurdles to a father's ability to give notice of a child's birth under his surname are evident in the processes detailed in sections 11(4) and (5). Section 11(4) provides that where the parents agree to amend the birth register to reflect the father's surname they may apply to the Director-General to amend the registration of birth. In terms of section 11(4A), this application is to be supported by prescribed conclusive proof of that person being the father of the child. Section 11(5) provides that if the parents cannot agree on the paternity of the child, the father of such a child shall apply to the High Court for a declaratory order confirming his paternity of the child.

Issues

[25] This matter raises two main issues. First, does the impugned section prohibit an unmarried father from registering a child's birth in the mother's absence? Is there a way to read section 10 in a constitutionally compliant manner? If not, does section 10 result in unfair discrimination (in respect of both the father and the child) and an infringement of their dignity?

[26] The second issue is the proper interplay between sections 9 and 10. The Full Court, as well as the respondents, reason that section 9 enables either parent to register the child's birth without the other parent's consent, whereas section 10 only relates to the issue of the child's surname. Thus, a proper interpretation of section 9 is also required, which addresses how the two sections interact and whether the sections reinforce or contradict each other.

Constitutional challenge

Proper approach to interpretation under the Constitution

[27] In respect of the first issue, section 39(2) of the Constitution provides a guide to statutory interpretation under our constitutional order. It creates an obligation to interpret all legislation in a manner that promotes "*the spirit, purport and objects of the Bill of Rights*". This means that all statutes, including section 10 of the Act, must be interpreted through the prism of the Bill of Rights. When the constitutionality of legislation is in question, a court must examine the objects and purport of that legislation and read the provisions of the legislation, as far as is possible, in conformity with the Constitution. A judicial officer must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided that such interpretation

can be reasonably ascribed to the legislation.[18] However, as this Court has noted "[l]imits must . . . be placed on the application of this principle".[19]

[28] Equally, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.[20] A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, although challenged as to its constitutionality, is reasonably capable of being read "in conformity with the Constitution".[21] Such an interpretation should not, however, unduly strain the language of the legislative provision.

Interplay between sections 9 and 10 of the Act

[29] As a point of departure, we should consider a plain reading of the sections. Section 9(1) of the Act refers to "any child born alive" and "any one of his or her parents" or "any prescribed person" if the parents are deceased. Evidently, this allows either parent of the child, irrespective of their marital status, to give notice of the birth. Section 9(2) begins with the words "subject to section 10". If section 10 is declared invalid, then, by implication, section 9(2) will not be read subject to section 10 and this will mean that the notification and registration of every child will be dealt with under section 9. This in turn means that there is no differentiation between the notification of children born in or out of wedlock. This amended version of section 9(2), in terms of which the words relating to section 10 of the Act are excised, would result in a

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[18] *Chisuse* above n 9 at paras 58-9; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001(1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai)* at para 22; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 24; and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

[19] *Hyundai* id at para 24; *National Coalition* id at paras 23-4; *Mistry v Interim Medical and Dental Council of South Africa* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 32; and *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 28.

[20] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 47-8; *Hyundai* above n 18 at para 24.

[21] *Hyundai* above n 18 at para 24.

constitutionally compliant application of the notification and registration process of a child.

[30] If the phrase in section 9(2) of the Act: "*Subject to the provisions of section 10*" is excised, then it means the surname of either the father or the mother of the child concerned, or the surnames of both the father and mother joined together as a double barrelled surname, can be used. Thus, either parent can register the child and it matters not whether a parent is married.

[31] A contextual reading supports this: section 9(2) deals with the surname to be given to the child and section 10 deals with the same issue. The ordinary reading of section 10(1) is quite simply that notice of a birth of a child is given under the surname of: (a) the mother, and does not stipulate who must give notice other than it must be under the mother's surname; or (b) the father, which requires there to be a "joint request" by the mother and the father whereas section 10(1)(a) does not indicate who must give notice of birth. However, since section 9(1) deals with who may give the request for the registration of any child, it appears that either parent may do so (or any of the prescribed persons where the parents are deceased) and there is nothing in the text of either sub-sections of section 9 that contradicts this.

[32] In my view, based on a plain reading of section 9(1) and (2) read with section 10, constitutional issues remain, even on the assumption that the High Court's interpretation that the word "mother" first mentioned in section 10(2) means "father" is correct. First, in terms of section 9 either parent may give notice of birth, but in the case of unmarried parents there are limited possibilities for the father's surname to be given to the child as it is the mother's automatic right unless the parents *jointly* request the father's surname in terms of section 10(1)(b). Second, that according to the default position under section 10, the surname must be that of the mother. So much is clear from section 10(1)(a). If not, then there is a cumbersome process in terms of section 10(1)(b) involving a joint request by the mother and the father and that has to take place in the presence of the official to whom the notice of birth was given, and the father must

acknowledge himself in writing to be the father of the child. Only then is the father's surname entered as the child's surname. Whilst section 10(2) avoids the cumbersome process of appearing before the official, there is still the formality requirement of a joint request which still requires the mother's consent.

[33] This would fit with the interpretation advanced by the applicant that the mother must always be involved. However, that interpretation seems to contradict section 10(1)(b) read with section 9(1), and it is a canon of interpretation that we should interpret two provisions in legislation so that they do not contradict each other.[22]

[34] To this end, section 10 still potentially infringes the rights of both the biological father and the child in two main respects. First, it potentially violates the rights of the child born to parents who are not married, particularly their constitutional right to a name and nationality at birth and the paramountcy principle. Second, it potentially violates the biological and unmarried father's right not to be unfairly discriminated against on the basis of his marital status, sex and gender which are listed grounds in terms of section 9(3) of the Constitution.

[35] For all these reasons, I disagree with the interpretation of section 10 advanced by the applicant. In my view, section 10(1)(a) does enable an unmarried father to give notice of birth without the mother's consent or presence. The only limitation imposed by section 10 (in its entirety) relates to the father's capacity to confer his surname on the new-born child. As things stand, an unmarried father (unlike a married father) can only confer his surname when giving notice of birth if he follows the procedures set out in sub-sections 10(1)(a) and 10(1)(b).

[36] The reason it is necessary to adopt a proper interpretation is that it centers the constitutional infringement discussion on the applicable concerns. We are able to focus on the real issue – whether there are any reasons that could justify the unfair

[22] *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) para 38.

discrimination that is established by section 10 when a distinction is drawn between children born to parents who are married versus those who are not. For the reasons that follow, I do not think that it is justifiable to distinguish between children born to married parents and children born to unmarried parents for the purpose of regulating what surname may be given to a child. And it is notable that the respondents, who are tasked with administering the impugned provisions, did not advance any justification for this discrimination.

Unmarried fathers' rights to equality and non-discrimination

[37] Section 10 of the Act undermines the role an unmarried father can play in this naming aspect. The parental rights of unmarried fathers are conditional in the sense that they are dependent on the status of their relationship with the mothers.[23]

Section 9 analysis

[38] The differentiation which the impugned law draws between married fathers and mothers on the one hand, and unmarried fathers on the other, infringes the rights of an unmarried father to equal protection and benefit of the law. However, because the grounds of differentiation in this case – namely sex, gender and marital status – are listed grounds in terms of section 9(3) of the Constitution, this may also raise questions of unfair discrimination, which I consider below.

[39] It is the applicant's case that the discrimination against the biological father and biological mother (because she does not have the necessary documentation or her visa has expired), is based on their marital status. In this particular case, their marriage is not recognised in South Africa, and this means that their child cannot be registered with the father's surname. The constraints of section 10 affect all unmarried fathers as a category. It results in disadvantages for them which are not experienced by married fathers.

[23] Louw "The Constitutionality of a Biological Father's Recognition as a Parent" (2010) 13 *Potchefstroom Electronic Law Journal* 156 at 189.

[40] In giving effect to the Constitutional principles of equality, it is instructive to consider the principles distilled from *Harksen*.[24] In that matter, this Court said the first enquiry must be directed to the question whether the impugned provision differentiates between people or categories of people. If it does differentiate, then there must be a rational connection between the differentiation in question and the legitimate government purpose it is designed to further or achieve.[25]

[41] Applying the first stage of the *Harksen* enquiry[26] to the facts at hand, it is clear that the impugned law differentiates between married and unmarried fathers in relation to their capacity to confer their surname onto their new-born child when giving notice of their child's birth. In addition, the impugned law differentiates between mothers (irrespective of their marital status) and unmarried fathers (as a category).

[42] It may well be that a legitimate government purpose is advanced by this differentiation, however none was proffered by the respondents who are tasked with administering the legislation in question. To the contrary, during oral argument, the respondents requested that this Court excise section 10 from the Act in its entirety. In my view, for the reasons that follow, no legitimate government purpose is advanced by distinguishing between married and unmarried fathers, at least not in respect of their capacity to register their new-born child's birth and confer their surname on him or her. Nor is there any legitimate basis for this gendered differentiation of the conferral of a surname where a child automatically bears the mother's surname but cannot assume their father's surname. As such, even on the first stage of the *Harksen* enquiry, the impugned law would be liable to be declared unconstitutional and invalid.

[43] This, however, is not the end of the enquiry. In this matter, the differentiation may also amount to discrimination because it differentiates between categories of

[24] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*).

[25] Id.

[26] Id.

people on several listed grounds, namely marital status, sex and gender. I consider the unfair discrimination claim next.

Section 9(3) of the Constitution

[44] Section 9(3) of the Constitution prohibits unfair discrimination on several grounds including sex, gender and marital status. In evaluating whether there is unfair discrimination, it is important to keep in mind the Constitution's commitment to substantive equality and establishing a non-sexist society.

[45] A further consideration regarding the validity or otherwise of section 10 is the extent to which it infringes the rights of unmarried fathers. When a child is born, the rights of both the mother and father should become vested. While a father can elect not to be legally recognised as the child's parent by simply absconding from his parental role, his position is rather precarious if he actually wants to be legally recognised as the child's father. His recognition will, to a large extent, depend on the mother's co-operation.[27] This begs the question: is marital supremacy a necessity for the registration process for the surname of his child? Should the concept of marriage even factor in the registration process? In my view, a marital neutral approach would better give effect to substantive equality as envisioned in the Constitution.

[46] Section 10 provides for differential treatment of an unmarried father. The Children's Act[28] recognises the role of both parents in bringing up a child.[29] It is *both* parents that bear the primary responsibility to care for their child, as is provided for in the Children's Act.[30] And, it is a child's right to bask in the parenting of *both* parents, irrespective of their marital status. Section 10 is problematic because it perpetuates stereotypical gender roles and the assumption that child-care is inherently a mother's duty.

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[27] Louw above n 23 at 191.

[28] 38 of 2005.

[29] Sections 18, 19 and 20 of the Children's Act.

[30] Id.

[47] Because the discrimination is on a specified ground, the unfairness of the discrimination is presumed. Nothing to the contrary has been established by the State. In *Hugo*, this Court said:

> "To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[31]

[48] In *Hugo*, this Court also stated:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[32]

[49] This Court in *Hugo* proceeded to refer, with approval, to the dictum in *Egan*[33] that "inherent human dignity is at the heart of individual rights in a free and democratic society".[34] Furthermore, in *Harksen* this Court stressed that "[t]he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity, or which affect people adversely in a comparably serious manner".[35]

[50] Turning again to the decision in *Hugo*, this Court said that this stage of the enquiry focuses primarily on the experience of the victim of discrimination. In the final

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[31] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at para 43.

[32] Id at para 41.

[33] *Egan v Canada* [1995] 2 SCR 513.

[34] *Hugo* above n 31 at para 41.

[35] *Harksen* above n 24 at para 51.

analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.[36]

[51] In order to determine whether the discriminatory provision is unfair, various factors must be considered. In *Harksen*, this Court identified the following three factors:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.
>
> These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness."[37]

[52] The impugned law establishes a prejudicial distinction between married and unmarried fathers. The impact on unmarried fathers is clear. They cannot register the birth of their child with their surname without the mother's consent or presence. The unmarried father and the child of unmarried parents are a vulnerable group who are affected by the discrimination.[38] They are stripped of the rights that married fathers

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[36] *Hugo* above n 31 at para 43.

[37] *Harksen* above n 24 at para 52.

[38] I explain the vulnerability of unmarried fathers at [69] below.

have to register children in their own name as these rights are made conditional and dependent on their relationship with the mother. This is a barrier to their full participation as parents and perpetuates gendered narratives about men's caregiving. So too, the children of unmarried parents are a vulnerable group who are also affected by the discrimination. It is a primordial need for some parents to want to name their child and register their birth and this should be a right for both biological parents.

[53] Section 10 unfairly discriminates against unmarried *fathers* on the basis of their marital status. The parents may be in a permanent life partnership or some other form of bond not within the traditional marital structure. Because of the different approach to the traditional concept of marriage, whether in the form of a permanent life relationship or other forms of relationships, it is the unmarried father who has to be subjected to the indignity of having his child registered as being born out of wedlock. The import of section 10 of the Act is that the unmarried father who has shown the necessary commitment to the child by wanting to possibly register the child with his surname, is discriminated against. Surely, there must be many unmarried fathers who, like the unmarried father in this case, commit to the notification and registration of their children in their surnames, which reinforces their commitment as fathers.

[54] Discrimination based on sex and gender has often been said to overlap with discrimination based on marital status.[39] Section 9(3) of the Constitution provides that the State may not discriminate directly or indirectly on the grounds of gender or marital status, and this is "deemed unfair unless the violation of the fathers' right to equality can be justified in terms of section 36 of the Constitution".[40]

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[39] Albertyn and Goldblatt "Equality" in Woolman et al *Constitutional Law of South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2006) Vol 3 at 35–61. In both the judgments of *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) and *J v Director-General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) the unfair discrimination on the ground of sexual orientation overlapped with discrimination on the ground of marital status.

[40] Louw above n 23 at 170.

[55] There is no justification for limiting an unmarried father's right to equality and as noted, none was proffered by the respondents. From a scholarly perspective, Sinclair proposes transforming the law to reflect a "fundamental premise of equality between parents".[41] Sinclair questions women's demands for constitutional equality while at the same time still insisting that it would be unfair to vest unmarried fathers with full rights.[42] In my view, advancing the rights of unmarried fathers in this context will not be prejudicial to the achievement of gender equality. If anything, a gender-neutral and marital-neutral approach to the process of registration of a child's birth enhances substantive equality by abolishing gendered and sexist stereotypes that regard women, and women alone, as responsible for the care of children.

[56] For all these reasons, it is clear that section 10 constitutes unfair discrimination against unmarried fathers on the basis of sex, gender and marital status. Furthermore, this discrimination cannot be justified when considering the egregious impact, it has on (i) an unmarried father's dignity; (ii) the manner in which it compromises his relationship with his newly born child; and (iii) the way it entrenches sexist and gendered stereotypes about the parental role of fathers vis à vis mothers. In any event, no justification was proffered for the discrimination by the respondents. In the result, the invalidity of section 10 must follow.

Unmarried fathers' right to dignity

[57] Section 1 of our Constitution, which sets out our founding values, provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

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[41] Sinclair "Family rights" in Van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (Juta & Co Ltd, Cape Town 1994) 502–572 at 540.

[42] Id.

[58] Whilst dignity is a complex concept and difficult to define, there is a universal minimum core concept that highlights its importance. Dignity transcends culture, politics and society.[43] The unmarried father, in asserting his right to register his child, is entitled to the recognition and affirmation of his dignity.[44]

[59] Human dignity is not just a founding value that informs the society sought to be created under the new constitutional order but also a justiciable and enforceable right. Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". It follows therefore, that everyone, irrespective of his or her marital status or status at birth, is a bearer of this right by virtue of being a human being.

[60] In *Makwanyane,* O'Regan J stated that:

> "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3."[45]

[61] Similarly, in *Freedom of Religion South Africa*[46], Mogoeng CJ dealt with the right to human dignity and explained:

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[43] Binder "Cultural Relativism and Cultural Imperialism in Human Rights Law" (1999) 5 *Buffalo Human Rights Law Review* 211.

[44] See Chaskalson "The Third Bram Fischer Lecture – Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *SAJHR* 193 at 196 and 204. Chaskalson explains when writing extra-curially that—

> "The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war. . . .
>
> As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony."

[45] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 328.

[46] *Freedom of Religion South Africa v Minister of Justice* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC).

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights."[47]

[62] Further clarity can be garnered from the Supreme Court of Appeal in *Watchenuka.* In *Watchenuka*, that Court eloquently described the right to human dignity as the "ability to live without positive humiliation and degradation".[48]

[63] Section 10 of the Act constitutes an infliction of an indignity that detracts from an unmarried father's primordial and biological connection to his child. Dignity cannot be a static concept as it must be "responsive to evolving attitudes, structures and beliefs".[49] Yet, it is perspicuous that the core content of section 10 of the Act has not evolved in accordance with our constitutional imperative to uphold and promote dignity.

[64] Despite the fluidity of the concept of dignity, there is a core content which embraces the humanity and intrinsic worth of every human being. In this case, it is the unmarried father and his child who are constitutionally entitled to this, and this entitlement must be protected by the State. The retention of section 10 of the Act would also undermine the unmarried father's right to dignity. It would imply that he is not entitled to be treated as worthy of registering the birth of his child with his surname in the mother's absence merely because he and the child's mother are not married.

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[47] Id at para 45.

[48] *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) at para 32.

[49] Henry "The Jurisprudence of Dignity" (2011) 160 *University of Pennsylvania Law Review* 169 at 189.

Unmarried fathers in a society based on ubuntu

[65] In *Makwanyane*, Langa J described *ubuntu* as a concept that "recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance" from the community.[50] To this end, *ubuntu* conveys our fundamentally interconnected nature as human beings and how, when we diminish the worth of even one segment of society, all of us lose a portion of our humanity.

[66] According to Mokgoro J, the meaning of *ubuntu* is better understood when examined in its "practical effect on everyday life".[51] She argues that a society based on *ubuntu* places "strong emphasis on family obligations".[52] It obliges family members to "help one another".[53] This is particularly apt in the case before us now. In this case, if an unmarried father cannot even carry out the obligation to register his child and obtain a birth certificate in his surname, then that is a form of intolerable humiliation.

[67] The application of the right to dignity embraces and stands alongside the value of *ubuntu.* A basic application of the principle of *ubuntu* shows that, in the operation of section 10, the unmarried father and his child are not only deprived of their dignity, but also of *ubuntu*. Undoubtedly, section 10 is an injury to an unmarried father's dignity, and perpetuates the societal stigma attached to unmarried couples and their children. It deems his bond with his child as less worthy, merely on account of his marital status. Furthermore, in doing so, it demeans this particular class of individuals (unmarried fathers and their children). For all these reasons, the impugned provision is clearly inconsistent with our fundamental constitutional right to human dignity, and the value of *ubuntu* which that right embraces.

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[50] *Makwanyane* above n 45 at para 224. *Ubuntu* entails the idea that *umuntu ngumuntu ngabantu* which means that a person is a person through other persons.

[51] Mokgoro "Ubuntu and the Law in South Africa" (1998) 4 *Buffalo Human Rights Law Review* 15 at 16.

[52] Id.

[53] Id.

The rights of children "born out of wedlock"

Is the amendment of the Act from the term "illegitimate" to "born out of wedlock" a euphemism for "illegitimate"?

[68] An analysis of the word illegitimate means "not allowed by law or rules".[54] Whilst the Act no longer uses the term "illegitimate child" this is implied by the reference to so-called children "born out of wedlock" which continues to perpetuate the common law distinction between so-called "legitimate" and "illegitimate" children.

[69] This reference is a stark reminder that we, as a nation, are still grappling with outmoded legal terminology which goes to the core of dignity and equality, not only for the child but also the unmarried father, and indeed the unmarried mother as well. The use of the expression "born out of wedlock" to describe a child undoubtedly injures their dignity and implies that they are not worthy of equal respect and concern. The continued distinction between children born within or out of wedlock, which the impugned law conveys, stigmatises the latter category of children. A separate process for the conferral of a father's surname during the birth registration process for children born out of wedlock remains contradictory to the rights of the child as embedded in the Bill of Rights and contradicts the paramountcy principle.

[70] The differentiation and supremacy of a married couple in comparison to unmarried couples continues to be problematic. South African society is not homogeneous, and it must be accepted that the concept of "marriage" no longer retains its stereotypical meanings. O'Regan J stated in *Dawood* that:

> "[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[55]

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[54] See the dictionary meaning of the word "illegitimate" in the Oxford English Dictionary (Oxford University Press, Oxford 2012) at 359.

[55] *Dawood* above n 20 at para 31.

[71] Children born to parents outside the marital bond are blameless, yet the retention of section 10 of the Act serves to harm children born outside of wedlock. The status of being born out of wedlock, in effect, penalises the child and the unmarried father, and of course the mother too. This differential treatment of children born out of wedlock is invidious and unconstitutional. This differential treatment cannot be justified.

[72] Whilst society *may* express its condemnation of *irresponsible liaisons* outside the bonds of marriage, visiting this condemnation on an infant, through the application of the law, is illogical and unjust. This Court has warned against punishing children for the *sins* of their parents; rather, children must be regarded as autonomous right-bearers and not "mere extensions" of their parents.[56] Moreover, imposing undue burdens on the "child born out of wedlock" is contrary to the basic concept of our system that legal burdens should be imposed on relationships between individuals. Obviously, no child is responsible for her birth and penalising the child is an ineffectual, as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family.

[73] Mayeri, writing about American laws on "illegitimacy", emphasises that "[l]egal discrimination between men and women or legitimates and illegitimates (born in or out of wedlock) with no rational basis should no longer be tolerated".[57] She notes that this

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[56] In *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 234, Khampepe J expounded upon this principle as follows:

> "As a point of departure, *it must be emphasised that children are individual right-bearers and not 'mere extensions of [their] parents, umbilically destined to sink or swim with them'*. It is the child whose world will be upturned by being told to leave the only school they have ever known. Moreover, it is their right to basic education that is interfered with; and it is their best interests that schools and parents are required to have due consideration of. *A child's participation right acknowledges their 'separate personhood' and 'the need to take seriously the view expressed by the child'. It is hardly in line with the constitutional recognition of a child as 'an individual with a distinctive personality' and with 'their own dignity'* for a school to submit that it has acted fairly by giving the parents a hearing but not granting the child an opportunity to express their views before they are removed from their school."

[57] Mayeri "Marital Supremacy and the Constitution of the Nonmarital Family" (2015) 5 *California Law Review* 1277 at 1328 where Mayeri refers to the *Fiallo plaintiff's* in *Fiallo v Bell* 430 US 787 (1977) at 169 (Weinstein J, dissenting) sex discrimination claim which focused almost exclusively on discrimination against unmarried fathers in an immigration case. Mayeri explains further that "They succeeded in persuading one of three judges, former civil rights lawyer Jack B Weinstein, whose dissent proclaimed that no legal discrimination between men

invidious statutory discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity. And, in such situations, "the courts should say what is plain: the statute is unconstitutional".[58] Some foreign jurisdictions have abolished the legal concept of illegitimacy entirely.[59] Others have "permitted legitimation by subsequent marriage and have legislated to mitigate the adverse legal consequences by extending to illegitimate children the same rights accorded to legitimate children".[60]

[74] For all these reasons, in my view, the concept of illegitimacy and differential rights for children born in and out of wedlock is inconsistent with the paramountcy principle and advancing the rights of children. As recognised in *Dawood*, the Constitution recognises a diversity of family relationships and regards children as autonomous, albeit vulnerable, beings who are bearers of rights and responsibilities in their own right. To the extent that section 10 entrenches the notion of marital supremacy and seeks to punish or condemn children for the nature of their parents' relationships, this in inconsistent with our constitutional values and has no place on our statute books.

The child's right to equality and to be free from unfair discrimination

[75] Section 10 of the Act also constitutes an infringement of a child's constitutional right not to be discriminated against on the grounds of social origin and birth (out of wedlock) in terms of section 9(3) of the Constitution, the child's right to dignity in terms of section 10 of the Constitution, as well as a child's right for their interests to be paramount in terms of section 28(2).

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and women or legitimates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity: the courts should say what is plain: the statute is unconstitutional."

[58] Id.

[59] Roche "Children and the Law" in Neil et al in *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, Amsterdam 2001) 15.

[60] Id.

[76] In my view, section 10 of the Act unfairly discriminates on the ground of social origin. In this context, social origin refers to an amalgam of intersecting factors related to a person's class or social position in society. Some commentators have noted the intersectional nature of social origin-based discrimination and how it often overlaps with discrimination against groups who are already vulnerable due to their race, ethnicity, nationality, and so on.[61] This observation is pertinent on these facts as the applicant has demonstrated that section 10 has a disproportionate impact on children from homes who cannot litigate in the DRC in order to obtain the necessary marriage certificate in order to comply with the Act. In addition, it is no coincidence in my view, that on these facts, section 10 had an impact on a child whose mother was a foreign national and who was unable to register their birth on her own for this reason. Thus, the intersectional nature of social origin-based discrimination is evident in this matter.

[77] Section 10 of the Act also clearly unfairly discriminates on the grounds of birth. Discussing discrimination against children born out of wedlock, this Court in *Bhe* said the following:

> "Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that 'een wijf maakt geen bastaard', the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-à-vis the

[61] See generally Capuano "Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the Fair Work Act 2009 (CTH) and the Australian Human Rights Commission Act 1986 (CTH): 'Class' Discrimination and its Relevance to the Australian Context" (2016) 39 *University of New South Wales Law Journal* 84 at 117-8, where he discusses how discrimination against Indigenous Australians overlaps with their race, class and social origin.

> child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them, which was harmful and degrading."[62]

[78] When a child is born, the rights of both the mother and father are vested in terms of the Children's Act. Section 21 of the Children's Act provides that the rights of the unmarried father become vested if the parents live together in a permanent partnership or if the father successfully applies to be recognised as the child's father. Clearly, the constitutional rights of the child born to parents out of wedlock should not be subjected to differential treatment when it comes to the registration of their birth in their father's surname.

Conclusion on children's rights

[79] In conclusion, the section is manifestly inconsistent with the best interests of the child as well as her rights to dignity and equality and her right to a name and nationality from birth. Historically, children born out of wedlock have been discriminated against under the law including in the law of testation such as the denial of an inheritance. Social attitudes have also historically led to active prejudice towards children born out of wedlock. This may have been ameliorated somewhat in modern times but still a child born out of wedlock remains outside of the stereotypical nuclear family where a married couple and their dependent children are regarded as a basic social unit. These social attitudes are unfortunate and keeping the category of separate registration for children born out of wedlock on the statute book further reinforces these perceptions.

[80] Their vulnerability also goes to the family affiliation where the child is that of one parent as opposed to married parents. Children may see themselves as being of inferior status as they do not have a proper family, and this can cause stresses such as social isolation and social stigma.

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[62] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 57.

[81] The section sediments the long-held distinction between "legitimate" and "illegitimate" children in our law which is abhorrent to our constitutional values of human dignity, *ubuntu* and substantive equality.

Possible human trafficking

[82] I must briefly address an issue which arose during oral argument. Essentially, this concerns the potential for human trafficking if proper safeguards are not provided by the remedy of this Court in respect of unmarried fathers and their children. Section 9(1)(A) of the Act provides that "[t]he Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner".

[83] In addition, section 9 must be read with Regulations 3, 4 and 5. These Regulations require the parents of the child to identify themselves by providing, amongst other things, their identity documents, fingerprints and the child's biometrics. In addition, Regulations 3, 4 and 5 require numerous documents that must be provided to give notice of birth. I also agree with the applicant's submission that reading-in "paternity tests" and other requirements would venture into the legislative terrain and may create insuperable practical burdens.

[84] The respondents also correctly point out that sub-sections 7(1)(a) and (b) of the Act empower the Director-General to request further particulars where a suspicion is raised as to the validity of the parent's relationship to the child. In my view, taken together, these safeguards are sufficient. The applicant correctly submits that evidence was not led in the High Court or in this Court on the extent, frequency, or circumstances in which human trafficking takes place, and what impact, if any, this has on what order this Court should make. As such, providing any relief on this aspect would amount to reopening the case, requiring evidence.

[85] Lastly, the contention that a married father can be trusted, without more, whereas an unmarried father automatically raises suspicions, is ultimately a prejudicial

approach. A married father can also falsify a marriage certificate and be a trafficker. As submitted by the respondents, the Department is addressing these issues, so it is not necessary, or appropriate, that this Court does so.

Remedy

[86] Save for what is set out below in relation to the proviso in section 9(2), section 9 can be read to mean that the notice and registration of the surname can be given by either parent regardless of the parents' marital status and without any prescription in terms of the manner of selection of the surname as provided for in section 9(2). Therefore, section 9 can be interpreted to be constitutionally compliant by taking into account the role of the unmarried father and the best interests of the child.

[87] However, section 10 is inconsistent with the Constitution and to that extent invalid. I am now required to consider a remedy that is not only appropriate but also just and equitable. The applicant submits that in the present case, appropriate relief demands more than a mere declaration that the impugned provisions are inconsistent with the Constitution and therefore invalid.

[88] The finding of unconstitutionality means that this Court ought to declare section 10 invalid to the extent that it limits the right of unmarried fathers to give notice of the birth of their child in their surname thereby unfairly discriminating against children born to unmarried parents. For this reason, section 10 is declared unconstitutional. In these circumstances, severance is the appropriate remedy and there is no need to read any words into section 10. In addition, however, the proviso in section 9(2) which states that the provision is "subject to the provisions of section 10" must consequently also be severed, but the rest of section 9 remains intact.

[89] The following order is made:

1. The declaration of constitutional invalidity of section 10 of the Births and Deaths Registration Act 51 of 1992 (Act) by the Full Court of the High

Court of South Africa, Eastern Cape Division, Grahamstown, is confirmed in the terms set out in paragraphs (a) and (b):

(a) It is declared that section 10 of the Act is invalid in its entirety and consequently severed from the Act.

(b) The proviso in section 9(2) of the Act stating that the provision is "subject to the provisions of section 10" is severed from section 9(2) by reason of the declaration of constitutional invalidity of section 10.

2. The declaration of constitutional invalidity referred to in paragraphs (a) and (b) takes effect from the date of this order.

3. The first respondent must pay the costs of the applicant in this Court, including the costs of two counsel.

MOGOENG CJ (Mathopo AJ concurring):

Introduction

[90] I have had the benefit of reading the main judgment, authored by my Sister Victor AJ, with great interest and much appreciation. I however disagree with the approach, much of the reasoning and the proposed remedy. Hence this judgment.

[91] Sections 9 and 10 of the Act make it much easier for a married father of a child, who was born alive, to register the birth of his child and under his surname with or without the mother's involvement, but imposes somewhat cumbersome requirements on an unmarried father. For this reason, the constitutional validity of these provisions has been challenged.

[92] Shorn of all its frills, this application is about whether these provisions impermissibly limit an unmarried father's constitutional rights to equality and dignity.[63] Additionally, it seeks to address the question whether it is in the best interests or to the

[63] Sections 9 and 10 of the Constitution, respectively.

prejudice of a child[64] for legislation to readily permit a father of a child born in wedlock to register the birth of and give his surname to that child and extend the same possibility to an unmarried man but subject to the consent of the child's mother. Put differently, the issue is whether these differential birth registration dispensations exist for the advancement of a legitimate, important and worthy governmental or societal purpose or for a wholly unnecessary perpetuation of marital supremacy with the resultant impairment of unmarried fathers' rights to equality and dignity and the best interests of a child.

[93] Inevitably, a question arises whether this differential treatment is reasonable and justifiable. In substance, does this not constitute unfair discrimination on the grounds of marital status, sex or gender?[65] These are the questions that lie at the heart of this matter.

The correct approach to interpretation

[94] With the advent of our constitutional democracy, this Court has been at pains to develop the jurisprudence on constitutional interpretation that is now settled. In *Hyundai*, Langa DP said:

> "Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. . . . This means that all statutes must be interpreted through the prism of the Bill of Rights.
>
> The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

[64] Section 28(2) of the Constitution.

[65] Section 9 of the Constitution.

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.

It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved."[66]

[95] And in *Bato Star*, Ngcobo J said:

"The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'. It 'affirms the democratic values of human dignity, equality and freedom'."[67]

[96] Inspired and guided by these principles, Khampepe J had this to say in *Chisuse*:

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[66] *Hyundai* above n 18 at paras 21-4 and 26.

[67] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 72.

> "Presently, this principle is captured fully by the provisions of section 39(2) of the Constitution, which oblige every court, where reasonably possible, to interpret every statute in a manner that makes it consonant with the Constitution. A claim for invalidity must fail if the impugned statute is reasonably capable of a meaning that is constitutionally compliant."[68]

[97] These then are the principles that must guide our approach to the interpretation of sections 9 and 10 of the Act. Our first choice must always be to construe provisions whose constitutionality is impugned in conformity with the Constitution. Only where the language of the provisions is incapable of that construction and that approach would only be possible if the language of the provisions were to be unduly strained, may they be interpreted in a way that yields unconstitutionality. This is so because that arm of the State charged with national legislative authority[69] – Parliament – must ordinarily be assumed to have carried out its legislative functions, alive to the spirit, purport and objects of the supreme law of the Republic and for the greater good of the populace. Regard being had to considerations of separation of powers, constitutionality challenges must necessarily be met with a judicial reluctance to readily interfere and read the impugned provisions as unconstitutional unless their language cannot reasonably be construed in conformity with the Constitution. This means that the provisions must thus be given their ordinary grammatical meaning, construed with due regard to the objects and purport for their enactment, but through the prism of the Constitution. And that meaning would, as the first prize, be one which preserves their validity.

Relevant provisions

[98] The Centre for Child Law has launched a frontal challenge to the constitutional validity of sections 9 and 10 of the Act. And section 9, says:

> "Notice of birth—

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[68] *Chisuse* above n 9 at para 58.

[69] See sections 43 and 44 of the Constitution.

> (1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.
>
> (1A) The Director General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.
>
> (2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.
>
> (3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth."[70]

[99] Section 10 provides:

> "Notice of birth of a child born out of wedlock shall be given—
>
> (a) under the surname of the mother; or
>
> (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.
>
> (2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth."[71]

[100] Sections 9 and 10 lay down the requirements for the registration of the birth of a child born alive that are different for married parents and unmarried parents. In order for a man who is married to register his child, the mother's consent is not required. And

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[70] Section 9 of the Act.

[71] Id section 10.

married parents may also have a child registered under both their surnames. Provision is also made for a situation where the child's parents are deceased. In that event "any of the prescribed persons" may, subject to compliance with the set requirements, register the birth of the child. Regulation 3(2) identifies those persons as "the next-of-kin or legal guardian of the child".

[101] This also applies to unmarried parents, provided they meet the section 10 requirements. Meaning, where an unmarried mother is deceased, the next-of-kin or legal guardian of the child would be entitled to register the birth of that child. And if the mother had given the written consent envisaged by section 10, obviously before she died, and the father is still alive, then either the father or the man who acknowledges in writing that he is the father, may register the birth of the child in terms of the section 10 process or as the next-of-kin. It is necessary to make the point that there is nothing about section 10 to suggest that the mother must necessarily be physically present at the Home Affairs offices to give the requisite consent. A written and signed consent that contains all the essential particulars of the mother or testified to by her verifiable close relations should suffice.

[102] Section 10 presents three scenarios that apply to children whose parents are unmarried. The first is a straightforward registration of the birth of the child by the mother regardless of what the views of the father, to whom she is not married or a man who has acknowledged or professed fatherhood in writing, might be. The second relates to a consensual request by the mother and either the biological father or a man who may not even be the biological father but who has, out of caring or special relationship with the mother or for whatever reason, in writing, assumed the responsibility of being the father. In that event, the child may be registered under that man's surname. The last relates to a situation where the biological father, or another man, acknowledges in writing that he is the father, and does so with the permission of the child's mother. In that instance, the child may nevertheless be registered under the surname of the mother.

[103] There is yet another scenario that unmarried parents could opt for. And this flows from a reading of section 10 with section 9(2). Once the section 10 requirements have been complied with, it should be open to both unmarried parents to agree that their surnames be "joined together as a double barrelled surname" of the child.

[104] To narrow or concretise the issue, an unmarried father is not precluded from registering his child. On the contrary, he may even register the child under his surname or under a double barrelled surname. The only difference is that the impugned provisions prescribe that this be conditional upon compliance with certain requirements. The central or dominant feature of these differential dispensations is that unlike in the case of a married man, the mother of the child must signify approval. The contention here is that because they are both fathers they should without more enjoy the exact same entitlements. This therefore is a demand for unbridled or absolute equality or identical treatment in all circumstances purely on the basis that they are after all men and fathers. Failure to adopt that approach does, in the view of Centre for Child Law, constitute unfair discrimination on the basis of marital status, sex and gender and is detrimental to the best interests of a child.

[105] By the way, the constitutionality of sections 9 and 10, really has no direct bearing on the experience of Mr Naki, as an unmarried father, and the facts that actually apply to their situation. The birth of his child could not be registered only because the visa of her mother, Ms Ndovya who is a citizen of the Democratic Republic of Congo, had expired. She therefore did not have a valid one required, not by sections 9 or 10 but, by the Regulations.[72] Hence the inability to register the birth of the child. In any event, that matter was appropriately dealt with and disposed of by the courts below. Additionally, the mother of the child was present and presumably had no objection to the registration of the birth of their daughter by her biological father and under his surname. Evidently, her section 10 consent was readily available.

[72] Regulation 8(3)(c).

[106] There is therefore nothing really about these provisions that stood in the way of the remedy sought by these "unmarried" parents. In other words, the concerns being raised about the paramountcy of the best interests of the child, and discrimination against an unmarried father, on whatever basis, do not arise here. It is just that the Centre for Child Law chose to pursue a case that is somewhat unrelated to the rights and interests of the child, of her father and mother that are directly implicated in that case. Also, issues relating to statelessness or the right to a name and a nationality[73] do not arise. For, these are not issues that are inextricably connected to a father. Birth registration by a child's mother does release these benefits or entitlements to a child. In sum, one of the challenges about this case is therefore that hypotheticals are being relied on to seek to address matters of profound constitutional significance.

[107] Ideally, the application should be dismissed so that the constitutionality of the impugned sections could be addressed under more appropriate circumstances in the future. But, the issues were fully ventilated and the Department is also supportive of the immediate disposition of the matter. And it is in the interests of justice in the circumstances that these issues be resolved once and for all.

Analysis

Our law on discrimination

[108] The Centre for Child Law contends that the impugned provisions discriminate against unmarried men on the basis of marital status, sex or gender and must therefore be declared constitutionally invalid. This enjoys the support of the Minister. Needless to say, this broad convergence of viewpoints on this legal issue is not binding on this Court. We are therefore at large to determine the correct interpretation of these challenged provisions. These guidelines from *Harksen* will be helpful in this exercise:

> "In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

[73] See section 28 of the Constitution.

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness.

If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2). One will then proceed upon the final leg of the enquiry as to whether the provision can be justified under section 33 of the interim Constitution, the limitations clause. This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality."[74]

[109] Aspects of *Harksen* that stand out for this interpretive exercise are in sum and context:

(a) the nature of the purpose sought to be achieved by the provision;

(b) whether the provision is manifestly directed at impairing unmarried biological fathers;

[74] *Harksen* above n 24 at paras 52-3.

(c) whether the rights or interests of biological fathers are affected and if so, to what extent;

(d) whether the provision is aimed at achieving a worthy and important societal goal;

(e) whether biological fathers have in fact suffered the alleged impairment; and

(f) whether the provisions constitute unfair discrimination on the grounds of marital status, sex or gender.

[110] In *Hugo* this Court said:

> "We need, therefore, to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[75]

[111] The pursuit of equal treatment and equal worth is not similar to an instance where identical treatment is always sought to be realised in all circumstances. This project is not about some box-ticking exercise that is divorced from or not informed by a deep and broad reflection on the overall impact of our decisions on related but contextually dissimilar scenarios. For, easy and mechanical equalisation without context could frustrate the legitimate pursuit of substantive equality. An outline of these principles sets the stage for a careful and thoroughgoing reflection on whether the dissimilarities between child registration dispensations for married parents and those who are not, constitute a constitutionally impermissible discrimination, based on marital status, sex or gender, between these two sets of parents, fathers in particular, or whether it is a mere

[75] *Hugo* above n 31 at para 41.

discrimination grounded on the need to promote the best interests of a child with particular regard to the paramountcy of the importance of those interests.

[112] This issue was addressed squarely in *Volks*, although it was in a slightly different context. There this Court said:

> "The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former.
> Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination.
> In determining whether discrimination is unfair one must consider the differences between the two groups. . . . The constitutional recognition of marriage is an important starting point for determining the question presented in this case."[76]

Here, too, a question arises whether the institution of marriage is being illegitimately used as an instrument for unfairly discriminating against a certain category of men on the basis of marital status, sex or gender.

Is marriage an instrument of unfair discrimination?

[113] Arguable as it still is whether drawing a distinction between married and unmarried men constitutes discrimination, and despite some of the observations I have made and will be making on this aspect, I do for the purpose of resolving the issues in this matter accept that section 10 of the Act does discriminate against an unmarried father on the basis of, for instance, marital status. Section 9(5) of the Constitution provides that discrimination on the basis of marital status, sex or gender amounts to unfair discrimination unless otherwise established. And that question does arise here.

[76] *Volks N.O. v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) at paras 49-51.

Is the discrimination between married and unmarried men or between unmarried men and unmarried women in relation to child birth registration, indeed reasonable, justifiable and fair?

[114] As stated, the government concedes that the impugned provisions discriminate unfairly against unmarried fathers. But, to determine whether a reasonable justification exists, is not and should not be solely dependent on what government has to say in defence of a statutory provision that actually or potentially limits the rights of citizens. Whether an important or worthy governmental or societal purpose is being served or advanced by the impugned provisions, is an objectively ascertainable factor which a court might well find to exist regardless of what a government functionary says or does not say in defence of or opposition to its retention. In other words, the constitutionality of legislation that limits rights ought not to swim or sink purely on the basis of what government representatives have to say. Well-known or self-evident factors or inferential reasoning based on objectively verifiable factors might well rescue legislation that government functionaries might have mistakenly thought should be left to drown into extinction. Nothing precludes this Court therefore from concluding that the best interests of a child would best be protected and promoted by ascribing to sections 9 and 10 a meaning that brings them within constitutional bounds in spite of the parties' common cause positions on the unconstitutionality of these provisions.

[115] When a couple chooses to have children or raise a family outside the confines of a marital relationship, that would not be a legally regulated relationship and its existence and features would not be as easy to prove as is the case with marriage. This is indeed so because how that relationship would have come into being and what commitments the parties would have made to each other would not ordinarily be readily ascertainable as a result of the absence of a legal framework or a known or settled way of bringing that relationship into being. This extends to the fact that it is not subject to regulation, even in relation to the recording of its essentials and the process leading up to its termination. Witnesses, if any, to its coming into being and when the decision would have been made to translate it into a permanent arrangement would also be difficult to

ascertain or establish, particularly in the event of a dispute or the death of one of the parties. Alive to these practical realities and contrasting this with the situation of a married couple, this Court said:

> "Mrs Robinson never married the late Mr Shandling. . . . Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.
>
> . . .
>
> To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement."[77]

It is not easy to determine what entitlements and obligations cohabitants would have committed to until the terms of their agreement, explicit or implicit, are disclosed or inferred from the surrounding circumstances.

[116] Marriage enjoys constitutional endorsement. Section 15(3)(a)(i) provides that nothing in the Constitution may be construed as an impediment to the recognition of marriages "concluded under any tradition, or a system of religious, personal or family law". *Volks* correctly observed that this constitutional recognition of the institution of marriage is an important starting point in resolving issues relating to whether discrimination on the ground of marital status is in reality unfair within a constitutional context.[78]

[117] Generally speaking, marriage is a culmination of a consultative process or information-dissemination, planning and the involvement of witnesses who often include extended family members, friends or acquaintances. It is often a public or semi-public, formalised, documented and an evidenced affair. It is a centuries-old institution,

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[77] Id at paras 55 and 58.

[78] Id at para 51.

accompanied by an exchange of verbalised commitments, from which binding legal, moral and societal obligations flow or are presumed. Its existence is fairly easy to establish.

[118] And marriage is indeed a highly covenantal relationship. Marriage and family are vitally important institutions that have a profoundly beneficial role in the upbringing of children. It is not only characterised by well-established and predictable formalities that make it easy to prove its existence, but it also fossilises covenantal obligations in a structured way, and institutionalises a range of privileges or benefits and a way of life together, which is not supposed to be easily broken. This extends to its centrality to family life and to the rights and entitlements that naturally flow and may be legally and morally inferred from its conclusion. Unlike in the case of unmarried cohabitants, serious legal processes ordinarily have to be embarked upon before marriage may be lawfully ended. This was authoritatively stated by Ngcobo J in these terms:

> "Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society. In this regard O'Regan J notes in *Dawood* that:
> 'Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This

> importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.'
> Marriage is also an internationally recognised social institution.
>
> . . .
>
> It is contended that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the marriage certificate. That is an oversimplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. *These obligations arise as soon as the marriage is concluded, without the need for any further agreement*. They include obligations that extend beyond the termination of marriage and even after death.."[79]

[119] It is indeed an oversimplification to treat marriage as a mere piece of paper. For, marriage sits right at the centre of and has, from time immemorial, been foundational to the establishment of a stable and functional family structure or unit. It also gives rise to predictable reciprocal rights and obligations between spouses and their shared duty of care and support for children. When a child is born of a married woman, barring evidence to the contrary, the husband is legally presumed to be the biological father and his surname, ancestry, clan and nationality will without more adhere to the child. This presumption exists for the advancement of the best interests of a child. Drawing from the societal, universal and constitutional recognition and inherent benefits of the institution of marriage, this Court said that it may at times be appropriate to accord certain benefits or entitlements to married people but not to unmarried people.[80] And this is what Parliament did in terms of sections 9 and 10 of the Act.

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[79] Id at paras 52-3 and 58.

[80] Id at para 54:

> "From this recognition, it follows that the law may distinguish between married people and unmarried people. Indeed, this Court in *Fraser* noted:
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> > 'In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with.'
>
> The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people."

[120] The undocumented, somewhat informal and unevidenced nature of a relationship other than marriage out of which a child is born, explains the differentiation. It is precisely because the impairment of the rights and interests of a father, who is in such a relationship, is not manifestly intended by the impugned statutory differentiation, that he is not completely left out of the possibility to register his child, even under his surname. There are safety measures built into the registration process to help him assume his fatherhood responsibilities notwithstanding the fact that he is not married to the mother. The unique role of the mother is recognised by legislation. This is done not to discriminate unfairly on the basis of sex or gender but to protect the interests of a child. The father may not therefore willy-nilly register the child regardless of what the mother's views might be in relation to his professed or assumed sense of responsibility.

[121] The Act, sections 9 and 10 in particular, must thus be understood within the context of the ease with which fatherhood is ascertainable in the case of a married couple, the legal obligations that flow to a child by operation of the law and the risks that flow from allowing any man known or claiming to be the father to register that child's birth without the mother's consent. The relationship is officially documented or recorded, the fact of the marriage being routinely captured in photographs and witnessed by many, who can be easily called to confirm the fact of its existence to Home Affairs, in addition to its own presumably dependable records, provide a rational basis for the distinction. All a possible father or a man professing to be the father of a child born out of wedlock is required to do, in terms of any of the High Court's or the litigants' preferred registration regime, is to simply acknowledge or allege fatherhood in writing. That should not suffice in the absence of the mother's reliable consent. After all, she should ordinarily be best placed to reliably say who the real father of the child is and whether his formalised introduction into the life of the child would be in the best interests of that child, all things considered.

[122] It is true that this recognition of the strategic role or "veto power" of an unmarried mother might be abused by some unscrupulous women. And it is also conceivable that a few women may for one reason or another not be able to register the birth of their children to the potential prejudice of the child. But, using an exception as the basis for developing the entire regulatory framework for a matter so sensitive and important is most likely to yield bad law. In any event, the more comprehensive child registration regime is a matter best left to Parliament. Considerations of separation of powers require that we confine ourselves to our constitutionally-ordained lane of travel and leave the other two lanes to the Executive and Parliament, barring permissible exceptions.

[123] Men are, broadly speaking, entitled to equal treatment with women. This is borne out by the child registration dispensation that applies to married parents. The distinction that applies to unmarried fathers serves an important and worthy societal purpose. And that is to entrust the welfare or protection of the child to the mother as opposed to an unmarried father whose status as such and commitment to the child's wellbeing is unrecorded and cannot therefore be presumed. Someone who presumably knows who the real father of the child is and whether he is committed to the wellbeing of the child must give this assurance to the State. And the mother of the child is that person.

[124] While it is true that the Act does not accord unmarried fathers the unconditional right to register the birth of their children, that that denial constitutes discrimination and does in reality constitute a disadvantage, that is a consequence of their choice to remain unmarried. The Act cannot therefore be said to impair their rights to equality and dignity or sense of equal worth. It does nothing to preclude anybody from getting married and accessing the legal rights, privileges and entitlements that flow from marriage. And this proposition finds additional reinforcement from what this Court said in *Volks*:

> "All that the law does is to put in place a legal regime that regulates the rights and obligations of . . . couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not."[81]

[125] It went on to say:

> "The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships."[82]

[126] Marriage is a choice. But, it is also such an important and invaluable social institution that it is not to be decried and wished or spoken out of its necessary existence or role. It is also not some unattainable or exclusionary elitist club that an average person has no easy access to. Contrary to some schools of thought, the law on marriage does not lay down cumbersome requirements to be met in order to enter into marriage and enjoy all the legal protections, privileges and rights that flow from it. Peer and other pressures may well have gotten the better of many and led them to believe that the high expenditure, often associated with the conclusion and celebration of a marriage covenant is an integral part of the legal requirements, when it is in reality not so. Rich or poor, all that is required of South Africans to conclude a valid marriage agreement is that they be of a particular age, have identity documents, and witnesses. To be married or not to be is, at least in so far as most men are concerned, a decision that is not dependent on how financially well-resourced one is. And it cannot therefore be said that this discrimination based on marital status is unfair and impairs the dignity of men

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[81] Id at para 91.

[82] Id at para 92.

who are financially under-resourced. It is not an economic issue. It is a choice issue. This I say, alive to the somewhat unfortunate trend to virtually commercialise the *lobola* component of customary marriages, to the detriment of those who want to marry but do not have the money demanded of them. But, not even *lobola*, the richness of what it really represents notwithstanding, is a legal requirement for or possible impediment to the conclusion of all marriages recognised by our law.

[127] It follows that the institution of marriage is not an instrument of discrimination here. The ease with which a married man can establish his actual or presumed biological fatherhood of a child born of a woman he is married to, and the mother's unique role as the most reliable source to attest to who the father is and whether he should be in the life of the child, render the differential approach to the registration of birth reasonable, justifiable and fair.

Right to dignity

[128] As regards the alleged violation of the right to dignity[83] of an unmarried person occasioned by a regime that is more favourable to a married person, this Court had this to say:

> "It was also contended that the failure to make provision for the people in the class to which Mrs Robinson belongs offends the dignity of members of that class.
>
> I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position."[84]

[83] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[84] *Volks* above n 76 at paras 61-2.

[129] Subject to minor contextual adjustments, this reasoning applies with equal force to this matter with regard to a married father's obligations to his children. The dignity of an unmarried father does not get enhanced or impermissibly limited by the child registration requirements. For, they are nothing more than a regulatory framework that reasonably and rightly demands certain assurances from the child's mother about whether a particular man is the father, and, if he is, whether it is appropriate for him to have any role in registering the child and even under his surname. Here too, an unmarried man is not being told that his "dignity is worth less than that of someone who is married". The fundamental difference between the nature of these two relationships informs the differentiation. This logic applies to the unmarried mother's more favourable position or role in the registration of the birth of a child.

[130] An unmarried man's right to equality and dignity in relation to a child is worth much more than the entitlement to register the birth of a child and attach his surname to the child. And the right to dignity cannot be adversely affected only because an unmarried father has certain requirements to meet in order to qualify for the entitlement to register his child in the name of the mother or under his surname.

[131] Circumstances under which a man would have contributed to the birth of a child, a real sense of responsibility and practicalised interest in the wellbeing of the child are more important considerations regarding what is in the best interests of the child. In the case of a married couple, though some fathers are irresponsible, it is the formalised nature of the commitment that comes with the father's predetermined responsibilities or legal obligations which redound to the best interests of the child, that account for the ease with which section 9 allows him to register even under his surname.

[132] In a theoretical and surreal world, it may be considered sufficient that one is a biological father to successfully insist on having an inherently equal or identical entitlement to register the birth of the child as a married man. But, at a more practical level, it should become apparent that the differentiation "is aimed at a worthy and important societal goal" of pre-emptively cutting out some of the potentially

irresponsible or even abusive but merely overzealous men from being so meaningfully introduced into the life of a child with consequences that might prove difficult or impossible to reverse. This is said advisedly because the commitment of those fathers to the wellbeing of the child is unrecorded and may therefore not be readily or legally assumed. And the more dependable safeguard in this regard is the mother of the child who presumably has the best interests of the child, that she carried to birth for about nine months at heart.

[133] This is therefore, not manifestly directed at discriminating unfairly against an unmarried father but precisely so that the best interests of a child and the paramountcy of their importance may be safeguarded.

Best interests of a child

[134] Section 28 of the Constitution provides in relevant parts:

> **"Children** —
> (1) Every child has the right—
> (*a*) to a name and a nationality from birth;
> (*b*) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (*d*) to be protected from maltreatment, neglect, abuse or degradation;
> (2) A child's best interests are of paramount importance in every matter concerning the child."[85]

[135] One of the inherent dangers of giving carte blanche to any man, who is or claims to be the father of the child but is unmarried to the mother, to register the birth of a child without the mother or a verifiable and reliable next-of-kin confirming his fatherhood and parental credentials, is human trafficking. While it is true that a dishonest man may present a fraudulent marriage certificate in an attempt to secure easy and irregular registration of a child's birth, he would thankfully have to be more elaborate in his

[85] Section 28 of the Constitution.

fraudulent enterprise. For, he would also have to contend with the ID and photograph therein of the real husband, and that of the wife, assuming that such a married couple exists. Remember, not only are the ID numbers of the couple included in a marriage certificate, but anyone claiming to be one of the couples reflected in the marriage certificate, would have to produce his or her ID to bear this out. And if the child's real parents are not even married then the Home Affairs records would help expose the fraudulent act. Importantly, not only are most of the marriages conducted by the Department of Home Affairs itself, and those it has authorised to be marriage officers, but Home Affairs is also the custodian of information on all legally regulated marriages, and all identity documents of the citizens of this country. In the event of a presentation of a fraudulent marriage certificate, for the purpose alluded to above, it should, as stated, be easy for Home Affairs, to whom that marriage certificate would be presented, to verify its authenticity based on readily available records. These are some of the measures in place to frustrate the intended fraudulent birth registration of a child in terms of the current legal framework.

[136] Children are vulnerable and their best interests are of paramount importance when issues that concern them have to be addressed. They must be protected and not be exposed to the risk of being easily claimed and "adopted" by people whose relationship with them or suitability to be in their lives, has not been established. Regarding those who might be claiming to be when they are in fact not fathers and the risk of them registering children who are not theirs, without the knowledge of the mother, it should be borne in mind that biometrics are not particularly helpful since they are not mandatory. Section 9(1A) says the "Director-General *may* require that biometrics . . . be taken in the prescribed manner". Meaning, something or someone would in all likelihood have to trigger the request for biometrics into operation in order for the Director-General to consider requiring it. Ordinarily and absent the need for the mother to have a strong or final say, any man who is in fact the father or merely claims to be the father would, on the approach preferred by the Centre for Child Law and the Department, be entitled to register any child and under his surname, without proper

regard for what is in the best interests of a child which the mother presently helps government to achieve.

[137] A woman and a man who are either in an unformalised relationship, and only got intimate once or a few times resulting in the birth of a child, or a rapist who has subsequently developed a curious interest in the child born out of his criminal and traumatic self-imposition on the woman all fall in the same category of unmarried fathers. That does not or ought not to conduce to the ready acceptance of a child being registered in the name of a man who claims to be the father, without any or particular regard for the views or consent of the one who carried the pregnancy through to birth. These factors are strong warning signs against the proposed drive to simply relax the critical safeguards built into the impugned legislation.

[138] It ought not to be enough that a man is in fact the father or merely acknowledges fatherhood, to then have him register the birth of the child, and even under his surname without the birth registering authority first hearing from the mother. Much more ought to be demanded of the unmarried father before he may do so. All this is to be done out of respect for the paramountcy of the best interests of a child. That a woman carries a pregnancy for about nine months, with all the pain and suffering that comes with it, neighbours and functionaries at medical facilities that offer pre-natal, midwifery and post-natal care presumably have records and can bear testimony to the reality that she gave birth, should be enough to explain why she deserves a special place in the life of her child, and more authority or say regarding the registration of birth and the surname the child must bear. An unmarried man does not have the proof of fatherhood readily available or easily ascertainable and lacks a similarly determinable track record of loving and suffering for the child, unlike the mother whose is evidenced by the pregnancy and birth.

[139] Section 10 is fundamentally in the best interests of a child and gives recognition to the constitutional demand to treat those interests as paramount. The law must not allow, as would be the case in the event of confirmation of any of the High Court’s

orders or any of the proposed dispensations, a rapist whose unconstitutional and injurious act resulted in the conception and birth of a child, to just "rock up" at Home Affairs, nine or 10 months since he last traumatised the mother, acknowledge fatherhood in writing or verbally and, where it is thought necessary duly backed-up by biometrics, and then register the birth of that child and give him or her, his surname. This, regardless of what the mother's views are. Similarly, a man who met the woman once or a few times and was not there during the difficult period of pregnancy should not be allowed to surreptitiously appear and, in the name of dignity and equality, register the child in his surname without the consent of the mother on possible maltreatment or neglect by him, informed by her knowledge of him. If the unmarried or even divorced biological father is caring and responsible the mother of the child would, barring exceptions, most likely grant the consent demanded by section 10.

[140] This analysis also reveals that the differentiation between married and unmarried fathers is not about stereotyping women as those who should bear the primary or sole responsibility for raising children, but about confronting the practical realities that unmarried South African mothers and children have to contend with most of the time. And it is also about giving recognition to and celebrating a married father's legal or covenantal obligations to help raise and care for the child working together with the mother.

[141] It cannot be seriously disputed that it is in the best interests of a child to be practically and more meaningfully linked to a loving, caring, supportive and responsible father, not just any man who happens to have fathered him or her. All things considered, the mother of that child is best-suited to tell whether the unmarried man claiming to be the father is in fact the father and a responsible one. Hence the need for her consent.[86]

[86] And that is why abusive fathers get divorced and custody is then awarded to a caring mother.

Conclusion

[142] This, therefore, is not a case of needless, and in reality, unfair discrimination on the basis of marital status, sex or gender. The impugned provisions are predicated on the need to give practical expression to the best interests of a child and their paramount importance. They are also grounded in the lived experiences of South Africans relating to some men who are happy to claim and give their surnames to children without any regard for a concomitant duty of care for them. A child's mother must therefore necessarily be asked to say: (i) whether the man claiming to be the father is indeed the father; and (ii) even if he is, whether he is the kind that would help advance the best interests of the child and give expression to the paramountcy of those interests or one whose somewhat formalised association with the child would be prejudicial to the child's best interests.

[143] A reading of sections 9 and 10 in a way that keeps them within constitutional bounds, does not expose a child to known or foreseeable risks. It protects and advances the best interests of a child and recognises the paramountcy of those interests. Sections 9 and 10 should thus be left intact. It would then be for Parliament, working with the Department, to, if so advised, consider making more appropriate provision for a situation where:

(a) a mother is for some reason not available to register the birth of her child;

(b) the mother is available but undocumented or unable to register the child for whatever reason;

(c) the mother is available but is inexplicably or unreasonably withholding her consent or refusing to register the child; and

(d) any other practical challenge exists that deserves legislative intervention.

[144] The proposed declaration of section 10 as constitutionally invalid, the deletion of "subject to the provisions of section 10" in section 9(2) and the order are loaded with

serious risks to the best interests of a child. The *Volks* decision on the constitutionality of the discrimination between married and unmarried people is as correct now, as it was then. Then this Court said:

> "The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage."[87]

This is not to say that rights and obligations may never be attached to an intimate relationship outside of marriage. But, to underscore and contrast the uniqueness of their attachment in a marriage setting with the general uncertainty in the case of unmarried couples.

Order

[145] The High Court has correctly cleared the impediment to the registration of the birth of a child that was created by the Regulations. Happily, Mr Naki and Ms Ndovya have presumably been able to or will now be able to register the birth of their daughter unimpeded by the relevant provisions of the Regulations. Regarding sections 9 and 10 of the Act, I would not confirm the declaration of unconstitutionality proposed for confirmation by any of the courts below. And I would therefore set aside the orders they made with no order as to costs.

[87] *Volks* above n 76 at para 56.

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